(19,191.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 169.

JOHN B. HUMPHREY, PLAINTIFF IN ERROR,

vs.

CHARLES T. TATMAN, TRUSTEE IN BANKRUPTCY OF NELSON H. DAVIS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

	Original.	Print
Writ of error	1	1
Return	2	2
Bond	3	2
Record	6	3
Writ	7	4
Plaintiff's claim of trial by jury	8	4
Return on writ	8	4
Plaintiff's declaration	9	5
Defendant's answer	12	6
Plaintiff's waiver of jury claim	13	6
Statement of agreed facts	14	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1904.

	Original.	Print
Finding of court	19	9
Rescript	20	9
Final order of superior court	20	9
Authentication of record	21	9
Application for writ of error	22	10
Assignment of errors	24	11
Opinion of full court	26	12
Original citation	34	15
Acceptance of service thereon	35	15
Final certificate of clerk of superior court	36	16

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Charles T. Tatman, trustee in bankruptcy of Nelson H. Davis plaintiff and John B. Humphrey defendant, in a plea of contract wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from this date in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of December, in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
By BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by
ALBERT MASON,
Chief Justice Superior Court.

1—169

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Superior Court.

In testimony whereof, I Theodore S. Johnson, clerk of said superior court for said county of Worcester, have hereto set my hand and the seal of said court this thirty-first day of December A. D. 1903.

THEODORE S. JOHNSON, *Clerk.*

3 Know all men by these presents, that we, John B. Humphrey of Boston, in the county of Suffolk and Commonwealth of Massachusetts, as principal, and Eunice H. Allen of said Boston and William A. Thompson of Medford in the county of Middlesex in said Commonwealth, as sureties, are held and firmly bound unto Charles T. Tatman, trustee in bankruptcy of the estate of Nelson H. Davis, bankrupt, in the full and just sum of three thousand dollars, to be paid to the said Charles T. Tatman, trustee, or his successors, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of December, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court, within and for the county of Worcester in said Commonwealth of Massachusetts in a suit depending in said court, between said Charles T. Tatman, trustee, as plaintiff and said John B. Humphrey as defendant, a judgment was rendered against the said John B. Humphrey and the said John B. Humphrey having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse
4 the judgment in the aforesaid suit, and a citation directed to the said Charles T. Tatman, trustee, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said John B. Humphrey shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good,

then the above obligation to be void; else to remain in full force and virtue.

JOHN B. HUMPHREY. [SEAL.]
EUNICE H. ALLEN. [SEAL.]
WILLIAM A. THOMPSON. [SEAL.]

Sealed and delivered in presence of—
EDWARD J. JONES,
To all.

Approved by—
ALBERT MASON,
Chief Justice Superior Court of Massachusetts.

SUFFOLK, *ss:*

DECEMBER 16TH, 1903.

The within named sureties and bond are approved by me.

EDWARD J. JONES,
Master in Chancery.

WORCESTER, *ss:*

DECEMBER 17, 1903.

I approve of the within bond.

CHARLES T. TATMAN, *Trustee.*

(Endorsed:) Charles T. Tatman, trustee, *vs.* John B. Humphrey. Bond. Copy. Bond approved by Albert Mason, chief justice of superior court, and filed December 19th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.

[Seal of the Superior Court.]

Attest: T. S. JOHNSON, *Clerk.*

[Endorsed:] # 375. Charles T. Tatman, Tr. *vs.* John B. Humphrey. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court, begun and holden at Fitchburg, within and for our said county of Worcester, on the first Monday of November, being the second day of said month, in the year of our Lord one thousand nine hundred and three, it is thus contained, the following being the entire record in the case:

7 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester, }

[L. S.]

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of John B. Humphrey of Boston in the county of Suffolk to the value of three thousand dollars, and summon the said defendant (if he may be found in your precinct) to appear before our justices of our superior court, at Worcester, within and for our said county of Worcester, on the first Monday of December next; then and there, in our said court, to answer unto Charles T. Tatman of the city and county of Worcester, as he is trustee in bankruptcy of the estate of Nelson H. Davis of said Worchester. In an action of tort.

To the damage of said plaintiff, as he saith, the sum of three thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

8 Witness, Albert Mason, Esquire, at Worcester, the thirteenth day of November in the year of our Lord one thousand nine hundred and one.

T. S. JOHNSON, *Clerk.*

Plaintiff gives notice that he desires a trial by jury.

And acceptance of service was on said thirteenth day of November signified by the defendant in the words following, to wit:

BOSTON, *November* 13, 1901.

Service of the within writ is hereby accepted.

JOHN B. HUMPHREY,
By WM. H. BROWN, *His Att'y.*

I appear for the defendant Humphrey.

WM. H. BROWN.

9 This action was entered in this court at the December return day, 1901, when the parties appeared, and on the second day of December, 1901, the plaintiff filed his declaration as follows, to wit:—

WORCESTER, *ss:*

Superior Court, December, 1901.

CHARLES T. TATMAN, Trustee,
vs.
JOHN B. HUMPHREY.

Plaintiff's Declaration.

Count 1. And the plaintiff says that he is the duly appointed trustee in bankruptcy of Nelson H. Davis of said Worcester and has given bond and qualified as such trustee; that said Davis filed a voluntary petition in bankruptcy and was adjudged a bankrupt on the twenty-third day of May, A. D. 1901. Said Davis on or about the thirtieth day of April, 1901, being insolvent, transferred to the defendant, who was then one of said Davis's creditors, the large and valuable stock of goods belonging to said Davis, with intent
10 on his part to hinder, delay and defraud his creditors and to prefer the defendant over his other creditors; and permitted the defendant to remove and conceal the said stock of goods with intent to hinder, delay and defraud the creditors of said Davis; and that the defendant, having reasonable cause to believe and knowing said Davis to be insolvent, and having reasonable cause to believe that a preference was intended, took said stock of goods, removed and concealed the same and appropriated the same to his own use; that said transfer, taking, removing, concealing and appropriating were in fraud of the provisions of the acts of Congress in such case made and provided. And the plaintiff, after his appointment and qualification as trustee in bankruptcy of said Davis, as aforesaid, duly demanded said goods from the defendant, but that the defendant refused to return them to the plaintiff. Wherefore the plaintiff claims damages.

Count 2. And the plaintiff says the defendant has converted *ro* his own use the stock of goods belonging to Nelson H. Davis of said Worcester, of whom the plaintiff is the duly appointed and qualified trustee in bankruptcy; wherefore the plaintiff claims dam-
11 ages.

The above two counts are for one and the same cause of action.

CHARLES T. TATMAN,
Trustee in Bankruptcy of Nelson H. Davis.

Filed Dec. 2, 1901.

12 And on the twenty-seventh day of December, 1901, the defendant filed his answer to plaintiff's declaration as follows, to wit. —

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } ss:

Superior Court.

CHARLES T. TATMAN, Trustee,
vs.
J. B. HUMPHREY.

Defendant's Answer.

Now comes the defendant and denies each and every allegation of the plaintiff's writ and declaration and of each and every count of the said declaration.

WM. H. BROWN,
By His Attorney.

Filed Dec. 27, 1901.

13 And on the 2nd day of April, 1903, plaintiff waives his claim for jury in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } ss:

Superior Court, April 2, 1903.

CHARLES T. TATMAN, Trustee, Pl'f,
vs.
JOHN B. HUMPHREY, Def't.

The plaintiff in said case waives his claim for a trial by jury.

CHARLES T. TATMAN,
Att'y for Pl'ff.

Filed April 2, 1903.

14 And on the 11th day of May, 1903, the plaintiff and defendant filed a statement of agreed facts in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

CHARLES T. TATMAN, Trustee,
vs.
JOHN B. HUMPHREY.

Statement of Agreed Facts.

This is an action of tort to recover the value of a stock of jewelry alleged to have been converted by the defendant to his own use and the case is submitted to the judgment of the court on the following statement of agreed facts.

The plaintiff is the duly appointed trustee in bankruptcy of Nelson H. Davis of said Worcester, who was at the time of the acts which are the foundation of this action, and had been for some years, a retail dealer in jewelry, watches and diamonds, carrying on business in the ordinary way in a store in Worcester, and the said
15 Humphrey was a wholesale dealer in diamonds in Boston.

Said Davis filed a voluntary petition in bankruptcy on the twenty-third day of May, A. D. 1901, and was adjudged a bankrupt on the same day. He owed considerable amounts for merchandise forming a part of his stock in trade, to a large number of creditors, of whom said Humphrey was the largest creditor, and his only property of any value consisted of the stock of goods and the fixtures in his store, which fixtures were mortgaged to the Worcester Collateral Loan Association for their full value by a mortgage executed and recorded about a month before the bankruptcy proceedings.

On the sixth day of March, A. D. 1899, the said Humphrey paid and discharged a debt of three thousand dollars due from said Davis to Morrill Brothers of Boston together with the chattel mortgage securing the said debt and took said Davis's promissory notes for three thousand dollars, and at the same time in consideration of said payment by said Humphrey said Davis duly executed and delivered to said Humphrey a mortgage, a mortgage in the usual form of mortgages of personal property, which covered the stock of goods and the fixtures which said Davis then had, and such future additions as he should make thereto, to secure the payments of said notes to said Humphrey and to secure future indebtedness.
16 Said mortgage provided that upon default the mortgagee should have the right to take immediate possession of all the property included within its terms and to remove the same. During the year 1899 further sales were made by said Humphrey to said Davis and the indebtedness under said mortgage was increased to forty-seven hundred dollars, which was the amount due when the defendant took possession of the stock. Said mortgage was never

recorded. Said Davis at the time of making said mortgage was not insolvent. In February, 1901, said Davis made a statement to certain of his creditors and to mercantile agencies that there was no incumbrance on his stock or fixtures (if the fact is material as against this defendant). On the thirtieth day of April 1901, having become dissatisfied with said Davis's payments and having reasonable cause to believe that said Davis was insolvent, and the said Davis being in default of his payments and otherwise in default under said mortgage, the defendant, acting under the powers given by said mortgage, took possession of said Davis's stock of goods and retained them in the store occupied by said Davis till May 1, 1901. Upon taking possession of the goods, the defendant became informed of the fact that said Davis was insolvent and on the following day, to wit, May 1, 1901, removed said goods to a storehouse in Boston and continued in possession of said goods thereafter.

17 On May 13, 1901, the defendant duly served a notice of his intention to foreclose said mortgage under the provisions of the Public Statutes, chapter 192, sections 7 and 9. All the goods taken were included within the terms of said mortgage and had been owned by said Davis and included in the terms of said mortgage for more than four (4) months previous to the filing of said petition in bankruptcy by said Davis. The goods were taken by the defendant against the expressed wish and the protests of said Davis and without his assistance. At the time of the taking possession and removal, there was no present consideration for the transfer of any of the goods, no advance having been made to said Davis after 1899. Said Davis was insolvent but was not contemplating bankruptcy before the taking of the goods and said taking forced him into bankruptcy. The plaintiff was appointed and qualified as trustee on June 18, 1901. He was immediately informed by the defendant of what had been done and that the defendant would deliver up the said goods upon the payment of the amount due under said mortgage. As soon as the plaintiff qualified as trustee he demanded said goods, but the defendant refused to give up the goods unless he was paid the amount due under said mortgage, which had accried before said taking of possession of the goods by the defendant and which

18 was still due and claimed the right to retain possession under his mortgage. The plaintiff refused to pay the defendant anything and claimed that the said mortgage did not justify the defendant in retaining the said goods. It is agreed that the amount owing from said Davis to said Humphrey under said mortgage at the time the defendant took possession of the said goods, and from that time to the date of plaintiff's writ, was in excess of the value of the goods. The value of the goods was $2,500.00 on May 1, 1901, and at the time of the alleged conversion, on account of which this action is brought.

CHARLES T. TATMAN,
Attorney for Plaintiff.
WILLIAM H. BROWN,
Attorney for Defendant.

Filed May 11, 1903.

19 And on the said 11th day of May, 1903, the cause having been heard, the court found for the defendant, as follows, to wit:

WORCESTER, *ss:*

Superior Court, May, 1903.

In the action Charles T. Tatman, trustee, against John B. Humphrey the court finds for the defendant *pro forma.*

F. A. GASKILL,
Justice of the Superior Court.

Filed May 11, 1903.

And on the 1st day of June, 1903, judgment was ordered for the defendant upon the finding of the court, from which judgment the plaintiff appealed to the next sitting of the supreme judicial court, to be holden for this county, and thence the case was continued.

20 And afterwards, to wit,—on the 27th day of November, 1903, the parties appeared and it was ordered by said supreme judicial court, by its rescript, as follows, viz.:—

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Nov. 25, 1903.

In the case of Charles T. Tatman *vs.* John B. Humphrey pending in the superior court for the county of Worcester—

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—judgment for the plaintiff.

By the court,

HENRY A. CLAPP, *Clerk.*

November 25, 1903.

Filed November 27, 1903.

It is therefore considered by court, to wit;—on the seventh day of December 1903, that the said Charles T. Tatman, trustee as aforesaid, recover against the said John B. Humphrey the sum of two thousand eight hundred and ninety dollars damage, and costs of suit taxed at sixty-one dollars and forty-five cents.

21 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this thirty-first day of December in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

22 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

CHARLES T. TATMAN, Trustee in Bankruptcy of the Estate of Nelson H. Davis,
v.
JOHN B. HUMPHREY.

To the Honorable Albert Mason, chief justice of the superior court of Massachusetts:

The defendant in this cause complains that on December 7th, 1903, judgment was entered by the superior court aforesaid within and for the county of Worcester in said Commonwealth in favor of the plaintiff in this cause in the sum of twenty-five hundred dollars ($2500) against the defendant in this cause.

That said judgment was rendered in this cause, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a mani-
23 fest error hath happened, to the great damage of the said defendant, as he is deprived thereby of the sum of $2500, which sum he is entitled to and ought of right to have.

Wherefore said defendant in order that said error may be duly corrected, prays that you will allow him a writ of error to the Supreme Judicial Court of the United States and that you will issue a citation to said plaintiff upon said writ of error so that said Supreme Court may cause further to be done therein to correct that error what of right according to the laws and custom of the United States should be done.

JOHN B. HUMPHREY.

HENRY W. PUTNAM,
WM. H. BROWN,
Att'ys for J. B. Humphrey.

24 *Assignment of Errors.*

In the Supreme Court of the United States.

JOHN B. HUMPHREY, Plaintiff in Error,
v.
CHARLES T. TATMAN.

The plaintiff in error in this cause avers that the superior court within and for the county of Worcester and Commonwealth of Massachusetts, erred in the rendition of judgment in this cause in favor of the plaintiff in the cause in said court, to wit: Charles T. Tatman, trustee, and against this plaintiff in error—defendant in said court—in the sum of $2500 and assigns the following errors, to wit:

First. The court erred in entering a judgment for the defendant in error upon the agreed facts.

Second. The court erred in deciding that the title of the plaintiff in error under his mortgage was defeated and terminated by the bankruptcy proceedings of Nelson H. Davis, bankrupt, and that the defendant in error could recover the value of the property by authority of the United States bankruptcy act of 1898.

Third. The court erred in deciding that the act of 1898 of the United States bankruptcy law makes the result by the creditor and not the specific intent of the debtor the essential fact and that the intent of the debtor and creditor *were* immaterial.

Fourth. The court erred in deciding that "in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates, under the bankruptcy act of 1898, and the amendatory act of February 5, 1903, from the acquisition of the possession under the mortgage."

25 *Fifth.* The court erred in the construction of the bankruptcy act of 1898 and in its application to this case, and especially in the construction of sects. 60*a*, 60*b*, 67*d*, 67*e* and 70*e* of said bankruptcy act.

Sixth. The court erred in deciding against the privilege and exemption claimed by the plaintiff in error under the United States bankruptcy act of 1898 and especially under sects. 67*d*, 67*e*, 70*e*, 60*a* and 60*b* of said act (U. S. St. at Large 1898, chap. 541).

Wherefore the plaintiff in error prays that said judgment may be reversed.

JOHN B. HUMPHREY,
By HENRY W. PUTNAM AND
WM. H. BROWN,
His Attorneys.

26 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *December* 15, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Charles T. Tatman *vs.* John B. Humphrey decided on the 25th day of November, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

27 TATMAN, Tr.,
v.
HUMPHREY.

KNOWLTON, *C. J.*:

The question in this case is whether the defendant's title under an unrecorded mortgage of personal property, made to him more than two years before the bankruptcy of the mortgagor, which covered the stock of goods and fixtures then owned by the mortgagor and such future additions as he should make thereto, and which was made to secure payment of certain notes and of future indebtedness, is good against the trustee in bankruptcy of the mortgagor. Under the R. L. c. 198, § 1, because of the failure to record the mortgage within fifteen days of the date written therein, and because the property had not been delivered to and retained by the mortgagee, the mortgage was not valid against any person other than the parties thereto. Haskell *v.* Merrill, 179 Mass., 120. About three
28 weeks before the commencement of the proceedings in bankruptcy, the mortgagor then being insolvent and the defendant having reasonable cause to believe him insolvent, the defendant took possession of the property covered by the mortgage, by removing it from the mortgagor's store, and afterwards retained it. After taking possession he served a notice of his intention to foreclose the mortgage under the provisions of the Pub. Sts. c. 192, §§ 7–9.

The defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this Commonwealth, or against an assignee in bankruptcy under the United States bankruptcy act of 1867. Folsom *v.* Clemence, 111 Mass. 273; Chase *v.* Denny, 130 Mass. 566; Blanchard *v.* Cook, 144 Mass. 207; Bennett *v.* Bailey, 150 Mass. 277; Bliss *v.* Crosier, 159 Mass. 498; Haskell *v.* Merrill, 179 Mass. 120; Gibson *v.* Warden, 14 Wall. 277; Sawyer *v.* Turpin, 91 U. S. 114.

The question of difficulty in the case arises under the United States bankruptcy act of 1898, whose provisions in regard to prefer-

ences and acts of bankruptcy differ materially from those of the bankrupt act of 1867. In Wilson Bros. *v.* Nelson, 183 U. S.
29 191, (7 Am. B. R. 142), the Supreme Court of the United States, in an elaborate opinion, discussed this difference, and pointed out its effect in cases similar to the present. In that case the bankrupt when solvent, nearly thirteen years before his bankruptcy, gave an irrevocable power of attorney to confess judgment for a debt which he then contracted, and this power was exercised by the creditor shortly before his bankruptcy.

Among the acts of bankruptcy mentioned in section three of the act, one is defined as follows: Having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference." In section 67*f*, it is provided "that all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same," etc. In section 67*e*, it is declared that "a lien created by or obtained in or pursuant to any suit or proceeding, at law or in equity, including a judgment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against
30 such person, shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference," etc. In view of these and other provisions of the act, it was decided, in the case just cited that suffering and permitting the creditor to obtain a preference through legal proceedings was an act of bankruptcy by the express provisions of the statute, irrespective of any active intent of the debtor at that time, to hinder, delay or defraud his creditors, or to give a preference, and notwithstanding that the power of attorney to confess judgment was given many years before, and it was said that the preference could be avoided and the property recovered by the trustee. It was held that in determining the time of an alleged act of bankruptcy, it must be deemed to have occurred when something open and notorious was done affecting the debtor's estate. It is also said in the opinion that "the act of 1898 makes the result obtained by the creditor, and not the specified intent of the debtor, the essential fact."

Under another clause of the statute the same distinction is drawn between this and the former act in the case of *In re* Klingman, 101 Fed. Rep. 691 (4 Am. B. R. 254) where it is said that "the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference, does

not begin to run until in some form they have received actual
31 or constructive notice of the transfer to the preferred creditor, and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt." The facts in this case were somewhat analogous in principle to those in the case at bar. Other Federal decisions tend in the same direction. White *v.* Bradley Timber Company, 119 Fed. Rep. 989. *In re* Metzer Toy and Novelty Company, 114 Fed. Rep. 957. *In re* Edward W. Wright Lumber Company, 114 Fed. Rep. 1011. *In re* Sheldon, 3 Am. B. R. 554.

Even though the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition, were not proceedings in court, and not legal proceedings if the term is construed narrowly, they were proceedings to enforce his legal rights. If the present case is not covered by the decision in Wilson Bros. *v.* Nelson, *ubi supra*, the principles upon which the two cases rest are very similar.

In section 3*a*, one of the acts of bankruptcy mentioned is having "transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." In the same section under *b*, the time for filing a petition founded on such an act of bankruptcy is within four months after "the date of the recording or registering of the transfer or assignment * * * if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual
32 notice of such transfer or assignment."

In view of these several provisions, and the language of section 60*a* and 60*b*, and the construction put upon the statute by the Supreme Court of the United States, we are of opinion that, in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates, under the bankruptcy act of 1898, and the amendatory act of Feb. 5, 1903, from the acquisition of possession under the mortgage.

In Matthews *vs.* Hart, 79 App. Div. 570 (9 Am. B. R. 373) the appellate division of the supreme court of New York, in a well considered opinion, made a decision which entirely covers the present case. The court held that the preference should be deemed to have been obtained at the time "when possession was taken, though the taking of possession was merely to effectuate an agreement made in good faith and many months before the prohibited time for making the transfer."

The case at bar certainly falls within the spirit and reason of the statute as interpreted in these decisions. The reason for the enactment as it is interpreted is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in

bankruptcy, made a statement to certain of his creditors and to commercial agencies, that there was no incumbrance on his stock or fixtures, a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's
33 bankruptcy, could take all of the debtor's property and leave nothing for the other creditors who had trusted him because of his possessions.

Judgment for the plaintiff.

33½ [Endorsed:] Tatman *vs.* Humphrey Certified copy of the opinion of the supreme judicial court.

34 UNITED STATES OF AMERICA, *ss:*

To Charles T. Tatman, trustee in bankruptcy of the estate of Nelson H. Davis, bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the superior court of Massachusetts in and for the county of Worcester wherein John B. Humphrey is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts, this fourteenth day of December, in the year of our Lord one thousand nine hundred and three.

ALBERT MASON,
Chief Justice of the Superior Court of Massachusetts.

35 WORCESTER, MASSACHUSETTS, *December* 14, 1903.

Due service of the within writ is hereby accepted.

CHARLES T. TATMAN,
Trustee as Alleged.

The clerk of the Supreme Court of the United States will please record my appearance for the defendant in error.

CHARLES T. TATMAN.

Charles T. Tatman, attorney at law, 311 Main street, Worcester, Mass.

36 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of

I. The record in the case of Charles T. Tatman, trustee in bankruptcy of the estate of Nelson H. Davis, against John B. Humphrey, in an action of tort brought in said superior court determined; and annexed to and transmitted with said record, of

II. The application for writ of error and the assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and the acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court this thirty-first day of December, in the year of our Lord one thousand nine hundred and three.

Seal of the Superior Court.

T. S. JOHNSON, *Clerk.*

37 [Endorsed:] # 375. Charles T. Tatman, trustee, pl'ff in error, *vs.* John B. Humphrey.

Endorsed on cover: File No. 19,191. Massachusetts superior court. Term No. 169. John B. Humphrey, plaintiff in error, *vs.* Charles T. Tatman, trustee in bankruptcy of Nelson H. Davis. Filed January 8, 1904. File No. 19,191.